Public Report

April 14, 2017: Deployment of Electronic Control Weapon

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A Public Report by the
Fairfax County Independent Police Auditor

Publication Date: December 29, 2017

A Fairfax County, Va., Publication

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INCIDENT

SEAN SMITH was interviewed during the administrative investigation of this matter. However, SMITH advised his interviewers that he has no memory of the incident other than arriving at 3066 Gate House Plaza in Falls Church on April 14, 2017, before waking up in the hospital the following day. The recitation of the INCIDENT, therefore, is based on information provided to investigators by others involved in the incident, those who were witnesses of it, and those who responded to it.

On April 14, 2017, members of the Fairfax County Police Department ("FCPD") Organized Crime and Narcotics Unit planned an arrest of Subject SEAN SMITH ("SMITH"). SMITH had agreed to sell two pounds of marijuana to an individual at the Sweetwater Tavern located at 3066 Gate House Plaza in Falls Church. Upon his arrival at the parking lot adjacent to the tavern, SMITH was positively identified and the FCPD Street Crimes Unit ("SCU") initiated the arrest.

When a member of the SCU verbally identified himself as a police officer, SMITH immediately ran away from him. However, his path was directly in the direction of Sergeant [redacted] ("[redacted]"), also a member of the arrest team who was approaching SMITH from the opposite direction. [redacted] attempted to get SMITH to stop running at him by aiming his electronic control weapon ("ECW")[1] at SMITH. [redacted] also activated the red lights of the ECW on SMITH's torso as a way to warn him that the ECW might be deployed. SMITH continued to run at [redacted], and when he got within 5-8 feet of [redacted],

[1] Fairfax County Police Department General Order 540.1 I.C. defines an electronic control weapon as a device which disrupts the sensory and motor nervous system of an individual by deploying battery-powered electrical energy sufficient to cause sensory and neuromuscular incapacitation.

[redacted] administered one five-second cycle of his ECW, striking SMITH in the front torso. SMITH lost control of his physical movements, causing him to fall forward on the parking lot. His face struck the concrete, resulting in a broken nose, a laceration on his forehead, and three dislodged teeth. After falling to the ground, SMITH appeared to lose consciousness and his body began to shake. When he regained consciousness, he began to fight (or flail) and several officers were needed to control his body movements so that medical treatment could be administered to him. Officers repeatedly informed SMITH that they were only trying to help him until medics arrived, and no additional force was utilized. Within approximately ten minutes, Fairfax County Fire and Rescue personnel arrived and took charge of providing care to SMITH.

The responding Fairfax County Fire and Rescue personnel administered sedatives to SMITH to calm him so that he could safely receive the necessary treatment. After being stabilized, he was transported from the scene to INOVA Fairfax Hospital. An extensive medical evaluation at the hospital revealed that Mr. Smith had not sustained any debilitating injuries. He was treated for the broken nose, laceration to his head, and missing teeth.

CRIMINAL INVESTIGATION

Initially both criminal and administrative investigations were commenced into the deployment of the ECW against SMITH. However, the FCPD discontinued its criminal investigation into the ECW deployment after detectives advised Commonwealth Attorney RAYMOND F. MORROGH of the status of the investigation and of SMITH's condition on April 15, 2017.

An arrest warrant was issued for SMITH and the warrant was served on him on April 15, 2017, charging him with Possession with Intent to Distribute Marijuana in violation of Virginia Criminal Code § 18.2-248.1(a)(2).

INTERNAL ADMINISTRATIVE INVESTIGATION

On April 14, 2017, an internal administrative investigation into this matter was initiated by the Internal Affairs Bureau ("IAB") of the FCPD. IAB personnel responded to the scene, along with the members of the FCPD Criminal Investigations Bureau ("CIB") Cold Case Unit who were responsible for the criminal investigation, and members of the FCPD Crime Scene Section ("CSS").

All appropriate interviews were conducted, and all potential evidence was pursued. No videotape of the incident was captured by PD equipment or by business establishments in the vicinity. All potential witnesses of and responders to the incident were identified and interviewed. It is my opinion that the FCPD IAB administrative investigation into this matter was complete, thorough, objective, impartial, and accurate.

Based on the IAB investigation into this incident, the FCPD found that [redacted] acted in compliance with FCPD General Orders ("G.O."), specifically G.O. 540 – Use of Force.

CONCLUSIONS

In relevant part, FCPD G.O. 540,[2] Use of Force, states that "[f]orce is to be used only to the extent it is objectively reasonable to *defend oneself* or another, to control an individual during

[2] G.O. 540 was recently amended and took effect on March 31, 2017.

an investigative or mental detention, or *to lawfully effect an arrest*."[3] G.O. 540 also dictates that "[f]orce shall not be used unless it is *reasonably necessary* in view of the circumstances confronting the officer."[4] I agree with the findings of the FCPD that [redacted]'s deployment of his ECW against SMITH was reasonably necessary to lawfully effect the arrest of SMITH and to defend himself; and, therefore, complied with departmental policy.

To assess whether force is objectively reasonable, G.O. 540.5 explains that an officer must give careful attention to the totality of circumstances in each particular case including:

1. Whether the individual poses an immediate safety threat to the officer or others
2. The severity of the crime
3. Whether the individual is actively resisting or attempting to evade arrest
4. Weapon(s) involved
5. Presence of other officers or individuals
6. Training, age, size and strength of the officer
7. Training, age, size and perceived strength of the individual
8. Environmental conditions.

It is worth noting that the first three factors listed above come directly from the United States Supreme Court decision in Graham v. Connor,[5] the momentous decision on law enforcement officers' use of force. All three of these factors weigh in favor of [redacted]'s ECW deployment being reasonable. First, SMITH is 6'2" tall and weighs 210 pounds. He was sprinting right at [redacted] – putting him at risk of physical harm - when [redacted] deployed his ECW. Second, SMITH was attempting to avoid arrest for attempting to sell two pounds of marijuana, a Class 5

[3] G.O. 540 II (italics added).
[4] *Id*. (italics added).
[5] 490 U.S. 386 (1989). These three factors used to determine the reasonableness of an officer's actions have become known collectively as the Graham factors.

felony which carries the potential for a term of imprisonment of not less than one year nor more than 10 years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both.[6] Third, SMITH was actively resisting and/or attempting to evade arrest when [redacted] deployed the ECW. FCPD G.O. 540.4 delineates the amount of resistance offered by people into three different levels. SMITH clearly satisfied the intermediate level of resistance, if not the most extreme level of resistance. G.O. 540.4 I.A.2 and 3 describe "Active Resistance" as "[w]here an individual's verbal and/or physical actions are intended to prevent an officer from taking lawful action, but are not intended to harm the officer," and "Aggressive Resistance" as "[w]here an individual displays the intent to cause injury, serious injury, or death to others, an officer, or themselves and prevents the officer from taking lawful action." For all of these reasons, [redacted]'s decision to deploy the ECW against SMITH so that SMITH could be safely arrested was objectively reasonable and complied with FCPD policy.

The unfortunate injuries suffered by SMITH after the ECW was deployed against him does not change the foregoing analysis. The aforementioned Graham v. Connor case makes clear that the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[7] FCPD G.O. 540.12 I. C. mandates that officers "refrain from unwarranted infliction of pain or suffering." Additionally, G.O. 540.12 I. E. requires that only those officers trained or certified by the Fairfax County Criminal Justice Academy shall be permitted to carry ECWs (among other force options). [redacted] received re-certification training on the carrying and deployment of the ECW on February 16, 2017, less than two months before deploying the ECW against SMITH.

[6] VA Code § 18.2-10.
[7] 490 U.S. at 396.

FCPD G.O. 540.16 IV.C. specifically addresses some safety concerns to consider before deploying an ECW by providing that "[p]rior to utilizing the ECW, officers should consider the totality of circumstances and the surrounding environment (e.g., persons standing in water) or the likelihood of injury when incapacitated by the ECW (e.g., persons on a ledge, building, or bridge)." [redacted] did not identify any of these or any other safety concerns prior to deploying the ECW against SMITH. He only deployed the ECW for one five-second cycle, and the ECW darts struck SMITH in his torso, the intended target for effective ECW use. Following other uses of the ECW by [redacted], [redacted] had observed only superficial injuries from falls. He did not anticipate the injuries sustained by SMITH. Clearly, [redacted] deployed his ECW to effect the arrest of SMITH in a reasonable manner, and was not trying to inflict pain or suffering. The unforeseen resulting injuries sustained by SMITH do not convert this reasonable use of force into an unreasonable one.

Additional parameters for the use of an ECW are set forth in FCPD G.O. 540.16. [redacted] complied with each of these parameters. Specifically, G.O. 540.16 IV. K. provides that "[w]hen practical, a warning should be given to the person prior to activating the ECW unless doing so would compromise any individual's safety. Warnings may be in the form of verbalization, display, laser painting, arcing, or a combination of these tactics." Although [redacted] estimated that only five seconds elapsed from the time SMITH began to run from the officer who first encountered him and the time [redacted] used his ECW, [redacted] was able to provide a visual warning to SMITH by "laser painting" his torso before activating the ECW. Furthermore, he only deployed the "ECW for one standard cycle (five seconds)"[8] against an individual who [had] made active movements to avoid physical control"[9] and was not merely

[8] G.O. 540.16 IV. E.
[9] G.O. 540.16 IV. B. 1.

"displaying passive resistance."[10] Finally, medical assistance was provided to SMITH following the use of the ECW, as is required by G.O. 540.16 VIII A.

RECOMMENDATIONS

Although I concur with the FCPD conclusion that [redacted] violated no law or policy by his deployment of the ECW, I will put forth two recommendations for the FCPD to consider based upon my review of the incident. The first is a minor addition to the training being provided to individuals certified to carry and deploy ECWs. The second involves a more comprehensive addition to the FCPD policy's list of factors to consider before deploying an ECW against an individual.

[redacted] received his most recent recurrent training on the ECW in February, 2017. FCPD G.O. 540.16 IV.C. cautions officers to consider environmental factors (e.g., when a person is standing in water) or the likelihood of injury (e.g., persons on a ledge, building, or bridge) when deciding whether to utilize an ECW. Based on the outcome of this incident, I recommend that the FCPD incorporate into that same policy provision, and into its training, the possibility that an ECW deployment on an individual running (especially on pavement) will result in significant injury to that person. The policy change and training should also include the possibility that injuries may result from any ECW-induced fall onto pavement, even when a person is not running at the time the ECW is used on him or her.

The more substantive policy recommendation is based on recent federal caselaw, and is not limited to the use of ECWs but should be incorporated into the overall Use of Force General

[10] G.O. 540.16 IV. A.

Order (G.O. 540).[11] The incident under review involved an arrest for an alleged criminal violation. Therefore, the traditional Graham factors[12] applied neatly to the analysis. However, there has been an increasing number of incidents in which law enforcement officers throughout the country have used force against individuals who were not involved in criminal activity, at least not at the outset of the encounter between the officer and the individual upon whom force was applied. In fact, FCPD G.O. 540 already includes the stipulation that "[f]orce is to be used only to the extent it is objectively reasonable . . . to control an individual during an investigative or *mental detention*, or to lawfully effect an arrest."[13] In these type situations, the Graham factors may be inapplicable; and, conducting the reasonableness analysis using them may be like trying to place the proverbial square peg into the proverbial round hole. Consequently, I recommend adopting policy which incorporates different factors to analyze uses of force when that force is used against individuals not initially involved in criminal activity.

Again, one example of such a situation would be when officers attempt to take custody of an emotionally disturbed person for whom the FCPD has a temporary detention order or an emergency custody order.[14] While there is no underlying crime needed for the basis of a temporary detention order or emergency custody order, law enforcement officers are often called upon to execute them by taking the person into custody and transporting them to a medical

[11] Because this recommendation is an overall policy change and does not relate to the specific circumstances analyzed in the situation under review, this recommendation will be more thoroughly outlined in a separate public report entitled USE OF FORCE POLICY RECOMMENDATIONS FOR THE NON-CRIMINAL CONTEXT.

[12] Note 5, *supra*.

[13] G.O. 540 II (italics added).

[14] VA Code § 37.2-808 A., for example, provides that a "magistrate shall issue .... an emergency custody order when he has probable cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment.

facility.[15] If force is used during the execution of the order, two of the three (if not all three) of the Graham factors simply will not apply. First, there is no crime at issue, so an officer cannot consider the "severity of the crime." Second, the "individual is not actively resisting or attempting to evade arrest," although he may be actively resisting or attempting to evade being taken into custody for a different reason. Finally, an individual subject to a temporary detention order or an emergency custody order may be posing an immediate safety threat only to himself, but not to "the officer or others." To analyze a use of force during this type of situation, therefore, factors other than the traditional Graham factors should be considered. This dilemma has recently been addressed in at least two federal court decisions.

First, in Armstrong v. Village of Pinehurst,[16] after a commitment order was issued for the commitment of an uncooperative individual named Armstrong, police officers deployed an ECW (in drive stun mode) against Armstrong several times. The officers were trying to persuade Armstrong to unwrap his arms from a stop sign post so that he could be returned to a hospital adjacent to where they were. The Fourth Circuit Court of Appeals ruled that the use of an ECW on a stationary, non-violent (although resisting) subject was an unconstitutional use of excessive force. The judge writing the opinion for the appellate panel did so after applying (or at least trying to) the Graham factors to the incident. Of course, trying to apply the Graham factors was difficult because Armstrong was not involved in a crime, was not actively resisting arrest, and was not posing a safety threat to officers or others, but only to himself. Like many law enforcement agencies, the FCPD issued guidance in the immediate aftermath of the Armstrong case. In a memorandum to his department dated January 20, 2016, FCPD Chief Edwin C. Roessler, Jr., mandated immediate changes to General Order 540.1, explaining that "[e]ffective

[15] VA Code § 37.2-808 C.
[16] 810 F.3d 892 (4th Cir. 2016).

immediately the use of the Electronic Control Weapon (ECW), whether in 'probe' or 'drive stun' mode shall not be used on passive resisting subjects who pose no immediate risk of danger to themselves, or others. Additionally, effective immediately, the 'drive stun' mode should be used only to supplement the probe mode to complete the neuro-muscular incapacitation circuit, or in response to a subject's assaultive behavior as a countermeasure to gain separation from the subject so that officers can consider another force option. Officers should not use drive stun solely as a pain compliance technique against someone who is not a threat to themselves or others." That guidance was a necessary step to comport with the Fourth Circuit's holding in Armstrong.

A second recent federal court case provides additional guidance on this issue. In April, 2017, the Sixth Circuit Court of Appeals decided Estate of Corey Hill v. Miracle.[17] In Miracle, paramedics were attempting to insert an IV catheter into Corey Hill's arm to stabilize his blood-sugar level. Ultimately, a sheriff's deputy deployed an ECW (in drive stun mode) against Hill to calm him so the catheter could be safely inserted. The incident was a medical emergency only; no criminal activity was occurring. However, before dying from complications from diabetes, Hill filed a lawsuit in federal court alleging, among other claims, a violation of his Fourth Amendment[18] rights based on the ECW deployment on him. The Sixth Circuit Court of Appeals conducting the analysis of this use of force recognized the dilemma posed by trying to use the traditional Graham factors in a medical emergency context. Instead of continuing to struggle with the dilemma, the appellate panel posed a "more tailored set of factors to be considered in

[17] 853 F.3d 306 (6th Cir. 2017), also No. 16-1818, United States Court of Appeals, Sixth Circuit.
[18] Amendment IV to the U.S. Constitution: The right of the people to be free in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

the medical-emergency context, always aimed towards the ultimate goal of determining 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them.'"[19] The court suggested "[w]here a situation does not fit within the Graham test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

(1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
(2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
(3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?"[20]

Just as the Armstrong case generated a change in FCPD policy, I believe that the Miracle case should generate a policy change to allow for these different factors to be used when determining the reasonableness of a use of force in a non-criminal situation.[21] These new factors, tailored to address a non-criminal situation during which force is used, should be applied when FCPD officers use any type of force (not limited to the ECW) to determine whether that force was reasonably necessary.

[19] 853 F.3d 306, No. 16-1818, p. 8, citing Graham, 490 U.S. at 397.
[20] 853 F.3d 306, No. 16-1818, p. 8.
[21] Virginia is part of the 4th Circuit Court of Appeals' jurisdictional area, making the Armstrong case directly applicable to members of the FCPD. While the 6th Circuit Court of Appeals' Miracle opinion does not set precedent for the 4th Circuit, its ruling can certainly help shape FCPD department policy.